

The Committee on Energy and Commerce
Internal Memorandum



June 22, 2011

TO: Members, Subcommittee on Oversight and Investigation

FROM: Subcommittee on Oversight and Investigations Staff

RE: Hearing on “OMB’s Role in the DOE Loan Guarantee Process”

On Friday, June 24, 2011, at 9:30 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Oversight and Investigations will hold a hearing entitled “OMB’s Role in the DOE Loan Guarantee Process.” The hearing will provide an overview of the Office of Management and Budget’s (OMB) involvement in the review of Department of Energy (DOE) loan guarantees, in particular, a loan guarantee awarded to Solyndra, Inc., a California company. In addition, the hearing will discuss issues raised in an October 2010 White House Memorandum regarding the DOE Loan Guarantee Program, as well as OMB’s responsiveness to a Committee document request dated March 14, 2011.

I. WITNESSES

One witness will testify at the hearing:

Jeffrey Zients, Deputy Director
Office of Management and Budget

II. DISCUSSION

A. The Authority of OMB to Review DOE Loan Guarantees

Under the Financial Credit Reform Act (FCRA) of 1990, OMB is responsible for determining and approving the subsidy estimates associated with loan guarantees awarded by federal agencies. The Credit Subsidy Cost represents the cost of the loan to the taxpayer if the recipient of the guarantee defaults on the loan. The Credit Subsidy Cost reflects several factors, including the cash flows of the loan recipient; the rate of recovery the government expects from the assets pledged as security for the loan; and the risk of default. In practice, the agency issuing the loan will use a model to determine the Credit Subsidy Cost, and OMB then approves the cost calculated by the agency.

With regard to DOE, the Energy Policy Act of 2005 authorized the Secretary of the Department to make loan guarantees to companies investing in either innovative clean technologies or commercial-scale renewable energy projects. In 2009, the American Reinvestment and Recovery Act (ARRA) appropriated funding to pay for the credit subsidy costs of the DOE loan guarantees for certain renewable energy, electric transmission, and leading edge biofuels systems (referred to as 1705 loan guarantees). The appropriation of this funding in the stimulus was critical to the ability of DOE to issue loan guarantees for clean energy projects because many loan guarantee applicants had been unable to come up with the funding themselves to pay the credit subsidy costs, which can be considerable. Since the stimulus provided funding for the credit subsidy costs, DOE has announced 20 conditional commitments for loan guarantees, and 11 of these guarantees have now closed. These loans represent over \$11 billion in guarantees.

B. OMB's Review of the Solyndra Guarantee

With regard to Solyndra, OMB first became involved in reviewing the Solyndra guarantee in December 2008. At that time, DOE had begun its active due diligence of the Solyndra loan guarantee. In early January 2009, ahead of a DOE Credit Committee meeting to approve a conditional commitment to Solyndra, DOE made a presentation to OMB staff regarding the Solyndra deal and some of its credit concerns. The DOE Credit Committee did not approve the conditional commitment, and therefore DOE made another presentation to OMB ahead of a second Credit Committee meeting in March 2009. Shortly thereafter, DOE announced the conditional commitment for a \$535 million guarantee to Solyndra to build a manufacturing facility for the production of photovoltaic (PV) solar panels.

Between the conditional commitment and the closing of the loan guarantee in September 2009, Solyndra was responsible for satisfying certain conditions precedent to closing. Once the terms and conditions of the guarantee were finalized, DOE made a third presentation to OMB on August 25, 2009. This presentation was more extensive than the previous ones, and included more information about the financial status of the company, the structure of the deal, and the potential risks and mitigants of the guarantee. Following that presentation, OMB asked DOE a number of questions about the company in order to determine whether DOE had assigned the proper risk values to the Solyndra guarantee. This back and forth took place over the course of a week. Ultimately, OMB recommended certain changes to the credit subsidy cost factors, which DOE accepted, and the loan guarantee closed on September 2, 2009. DOE's Loan Program Office estimated that the guarantee would create 3,000 construction jobs and 1,000 jobs once the facility opened.

C. Issues Relating to Solyndra

Following the closing, DOE continued to monitor Solyndra's financial status and construction progress at the new manufacturing facility.

In 2010, Solyndra experienced a number of financial setbacks. In March 2010, Solyndra's auditor, PriceWaterhouseCoopers stated in the company's SEC registration that the "Company had suffered recurring losses from operations, negative cash flows since inception and has a net stockholder's deficit that, among other concerns, raise substantial doubt about its ability to continue as a going concern." Just three months later, in June 2010, the company cancelled a \$300 million Initial Public Offering (IPO). On November 3, 2010, Solyndra announced that it was closing its older manufacturing facility, resulting in the layoff of 135 temporary employees and approximately 40 full-time employees.

This year, DOE announced that it had modified the terms of the Solyndra loan guarantee to extend the repayment period. In addition, two Solyndra investors announced at the same time that they had entered into a \$75 million credit facility with the company, with the option of a second \$75 million.

The company has announced several sales contracts over the last year both in the U.S. and abroad for the sales of its panels. Solyndra is focusing its sales efforts on the commercial flat-roof market, such as "big box" stores, due to the shape of the tubes in its solar installation. The company has also had some success selling these panels for agricultural solar installations.

D. White House Memorandum on the DOE Loan Guarantees

OMB's role in reviewing and approving DOE loan guarantees was the subject of an October 25, 2010, White House Memorandum addressed to the President from Carol Browner (then-Director of the White House Office of Energy and Climate Change Policy); Ron Klain (then-Chief of Staff to Vice President Biden); and Larry Summers (then-Director of the National Economic Council). *See* Attachment A. The memorandum sought President Obama's "direction" regarding the implementation of the Loan Guarantee Program, and notes that the program had been subjected to criticism for its "slow implementation" and "making commitments to projects that would have happened anyway and thus fail to advance [the President's] clean energy agenda." In addition, the memorandum states that:

OMB and Treasury . . . have raised implementation questions, including "double dipping" — the total government subsidy for loan guarantee recipients, which have exceeded 60%, "skin in the game" — the relatively small private equity (as low as 10%) developers put into projects; and non-incremental investment — some loan guarantee projects would appear likely to move forward without the credit support offered by [Section 1705 loan guarantees] (including those projects that already exist and for which the loan guarantee simply provides a means for refinancing.

The memorandum also mentions a "policy review" conducted by the White House of the DOE loan guarantees, and explains that this review has sometimes resulted in extending the amount of time a guarantee is under review. It concludes by discussing a number of options to change the way the loan guarantee program is implemented, including limiting OMB's oversight role.

E. OMB's Responsiveness to the Committee's March 14 Letter and Document Request

As part of its investigation of the Solyndra loan guarantee, Chairman Fred Upton and Subcommittee Chairmen Cliff Stearns and Ed Whitfield sent a letter to OMB Director Lew requesting a briefing and certain documents relating to the Solyndra guarantee. The briefing took place on April 11, 2011. While the briefing provided information about OMB's role generally, the briefers were not able to address the specific concerns OMB had with the Solyndra guarantee.

With regard to documents, OMB has engaged in a rolling production. Since the letter was sent almost three months ago, OMB has produced 20 separate documents totaling 393 pages. Each of these documents was provided by DOE to OMB during the course of OMB's review of the Solyndra guarantee. OMB coordinated with DOE on the production of cash flow documents showing the risk and default ratings assigned to the Solyndra guarantee; almost 30 pages of these documents were produced in wholly redacted form. In order to accommodate OMB's concerns that release of these documents, if made public, would allow future loan applicants to "game" the system, Committee staff agreed to an *in camera* review of these documents. The review of the unredacted versions of these records took place at DOE headquarters on April 27, 2011.

OMB has yet to produce any notes, analyses, memoranda or other documents that its staff has created in response to the Solyndra review.

Since the *in camera* review, Committee staff has pressed OMB to begin producing communications responsive to the March 14, 2011, letter. Throughout the month of May, Committee staff had numerous telephone calls with OMB staff regarding the production of these documents. OMB explained that they did not want to produce internal emails showing the back and forth among OMB staff about the Solyndra deal. OMB has repeatedly stated that, in their judgment, the Committee does not need to see the emails. As a compromise, OMB proposed a second briefing with the Director of the Budget Division, and represented that this briefing would provide all the details of the OMB deliberations and what OMB's questions and concerns were regarding the Solyndra guarantee.

Committee staff communicated that a briefing was not sufficient, and that the emails must be produced in order for staff to have an accurate understanding of what OMB's concerns were in real time. To address OMB's concerns regarding the production of these documents, Committee staff stated it would be willing to accept an *in camera* review of these documents. Committee staff could not reach an agreement with OMB staff regarding this production so, on May 25, 2011, Oversight and Subcommittee Chairman Cliff Stearns called OMB Deputy Director Jeffrey Zients to discuss the matter. During that call, Chairman Stearns told Deputy Director Zients that the Committee wanted to see the OMB emails showing the back and forth among OMB staff regarding the Solyndra guarantee. Chairman Stearns explained that a briefing was not sufficient, as it would not be able to reflect the precise details of the review, and that the purpose of an investigation is to verify the facts through the review of documents.

On May 26, 2011, OMB reached out to Chairman Stearns and stated that OMB would agree to the *in camera* production of these documents during a briefing to be provided by the Director of the Budget Division. The briefing and *in camera* production took place on June 7, 2011. Although Chairman Stearns and Committee staff had made clear that the *in camera* review was to include all emails, including internal emails, showing the back and forth among OMB staff regarding the Solyndra deal, OMB produced only eight emails sent during the one week period in August 2009 preceding the closing of the Solyndra loan guarantee. These emails were between OMB and DOE staff, and did not include any internal emails among OMB staff members regarding the Solyndra loan guarantee. The emails that were produced showed only the questions that OMB asked DOE following its August 2009 presentation to DOE, and DOE's answers to those questions. In response to Committee staff's questions, OMB staff acknowledged that OMB had identified other emails between OMB and DOE staff, as well as internal emails between OMB staff members, relating to the review of Solyndra, but that those emails were not included in the production. OMB stated that its position is that the emails included in the June 7 *in camera* production that show the questions OMB asked DOE represent OMB's assessment of the strength and weaknesses of the project and OMB's projected impact on the Credit Subsidy Cost. According to OMB, it is unnecessary for the Committee to see the internal emails because OMB does not believe those emails are important to understanding OMB's review.

III. ISSUES

The following issues will be examined at the hearing:

- The various aspects of OMB's involvement in the Solyndra guarantee throughout the period of its review;
- Concerns about OMB's role as it pertains to DOE Loan Guarantees that were raised by the October 2010 White House Memorandum; and,
- OMB's responsiveness to the Committee's March 14, 2011, letter and document request.

IV. CONTACTS

If you have any questions about this hearing, please contact Karen Christian or Todd Harrison at (202) 225-2927.

Attachment